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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 744

UNION LEADER CORPORATION, doing business under the names MANCHESTER UNION LEADER and THE NEW HAMPSHIRE SUNDAY NEWS, *Petitioner*

v.

ROGER H. CHAGNON, doing business as CHAGNON'S GARDEN CENTER, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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CONSTITUTION OF THE UNITED STATES:

First Amendment 2, 3, 7, 8, 14, 16, 17
Fourteenth Amendment 2, 3, 7, 8, 14, 17

STATUTE:

28 U.S.C., § 1257(3) 2

MISCELLANEOUS:

Cooley's Blackstone, Commentaries on the Law of England (4th Ed., 1899) 20
Donnelly, "History of Defamation," 1949 Wisc. Law Rev. 99 (1949) 15
Hall, "Preserving Liberty of the Press by the Defense of Privilege in Libel Actions," 26 Cal. Law Rev. 226 (1938) 16
Holdsworth, A History of English Law (7th Ed., 1956) 20
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Hampshire, entered on October 27, 1961, and the order of the Court denying defendant's motion for rehearing, entered on November 30, 1961.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Hampshire is not yet officially reported, but is unofficially reported at 174 A. 2d 825 (1961), and appears at pages 1a-26a of the Appendix. The order of the Court denying defendant's motion for rehear-

ing is unreported, and appears at page 26a of the Appendix. The ruling of the Superior Court, the court of first instance, on defendant's motion to set aside the verdict is unreported, and appears on pages 27a-28a of the Appendix.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of New Hampshire was dated and entered October 27, 1961, and the order of the Court denying defendant's motion for rehearing was dated and entered November 30, 1961.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code, Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C., § 1257 (3).

QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments prohibit constructive censorship of the press by a judicial determination in a libel action which finds actual malice from facts and circumstances that by their very nature and character are not evidence of malice, and which imposes a punitive and oppressive verdict on a newspaper for fairly reporting in good faith a controversy involving the expenditure of public funds?

2. Is a judgment in a libel action in a State Court rendered unconstitutional under the Due Process Clause of the Fourteenth Amendment where it relies for evidentiary support to prove the intent of the publisher upon adverse partisan witnesses incompetent to testify to the publisher's intent?

CONSTITUTIONAL PROVISIONS INVOLVED

"Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

Amendment I,
Constitution of the United States

"Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIV,
Constitution of the United States

STATEMENT OF THE CASE

This is an action for libel brought as a result of the publication of articles on five consecutive Sundays in 1954 in defendant's New Hampshire Sunday News, and of four items of promotional advertising published in the Saturday editions of defendant's daily newspaper, the Manchester Union Leader. The publications related to the performance of a public contract, awarded upon competitive bids to plaintiff by the City of Manchester, to furnish trees and shrubs for the landscaping of Merrimack Common, an historic city park, upon its conversion to an automobile parking lot.

The articles were written by James Stack, a reporter who had written several other articles involving large expenditures of State funds, and was considered by his editor particularly well qualified at getting to the bottom of a story (R. 130, 232). On July 1, 1954, Stack received a telephone call from an unsuccessful bidder for the same job, who sought to remain anony-

mous but then revealed his identity, to the effect that plaintiff "had actually substituted another species of tree" for those required by the specifications (R. 159). Stack was referred to one Pearson as a disinterested landscape architect who would confirm the truth of the statement (R. 159). Stack spoke to Pearson (who was later employed by the City of Manchester in connection with the contract as "an acknowledged authority," one who would have "the most authority" of those available in Manchester) (R. 680-681) (R. 160); to the Superintendent of Parks and Playgrounds, the city department in charge of the project (R. 30, 163); to the city employee who selected and planted the stock (R. 174, 333); and to several other local nurserymen (R. 170, 189, 194). Stack himself went to Merrimack Common to examine the trees, and had a photograph taken of himself with the trees at the entrance which was published with the newspaper article (R. 172).

After trying on several occasions to reach plaintiff (R. 162, 163, 168-170, 174), Stack spoke to plaintiff by telephone on July 3, 1954, outlined the information given him, and stated the newspaper was ready to print the story (R. 182). Plaintiff denied that the trees did not meet specifications, and would not say how much he had paid for the trees, but asked the reporter to hold up the story until they could have a personal interview because it was false and publication of it would harm his reputation (R. 182, 461, 520). Stack was not free at the time to leave his office, and it was his experience that at times a person who is going to be the subject of a news story will seek to put it off by asking to see the reporter later (R. 182, 461). Plaintiff was advised that it was too bad they

had not gotten together earlier, but in all probability the story would be printed, since an individual believed to be an expert had been consulted, the subject of the article had been given an opportunity to comment on the charges, and his statement would be published (R. 186).

Before the article was printed, it was reviewed by the newspaper's editor, who determined that plaintiff had been checked and would be quoted, and it was personally cleared with the newspaper's counsel as part of the newspaper's regular procedure (R. 188).

The first article pertaining to this matter was published on July 4, 1954. In reporting the controversy the article also stated (P. Ex. 11):

> "ACCUSATION DENIED
>
> "Mr. Chagnon, apprised of the charges last night, denied stoutly that he had substituted 'an inferior species,' or that any of the trees planted do not meet size specifications and all other standards."

Articles on four succeeding Sundays reported later developments.

Thereafter City officials, who had conferred with plaintiff and his counsel, and who had also inspected the trees and found that all the other people with whom they discussed the matter seemed to be in agreement that the trees were not up to specifications, decided to rescind the contract as a result of their own investigations (R. 649, 669-670). Plaintiff secured a verdict against the City of M. hester for breach of contract; one of the issues in the case was whether the City had accepted the trees before it gave notice to plaintiff of a breach of warranty (R. 220-222, 260).

The articles concerning the contract with the City for $5,709 were published in the summer of 1954. Even before their publication, the gross sales of plaintiff's business had decreased by $17,000, from $88,000 in 1952 to $71,000 in 1953 (R. 549). The equity in his business had been reduced from approximately $20,000 at the end of 1952 to $6,350 at the end of 1953, so that his loss of $13,650 in the one year immediately preceding the publication was almost as great as that in all three years after publication (R. 569, 571). His income went *down* in 1953, the year before publication, and went *up* in 1954, the year of publication (R. 553, 573-574);

Year	Profit (Loss) Before Depreciation	Profit (Loss) After Depreciation
1949	$ 6,936.66	$ 3,877.22
1950	(821.32)	(4,719.11)
1951	3,280.60	(2,485.02)
1952	6,455.66	886.95
1953	(3,549.26)	(7,584.79)
1954	4,720.80	1,195.06
1955	74.82	(2,960.38)
1956	(1,596.44)	(3,415.39)
1957	5,150.10	3,898.56

The most plaintiff withdrew during any one of these years was $7,864.26 in 1951 (R. 551). The jury awarded a verdict to plaintiff in the amount of $99,000 (R. 825), 15 to 25 times the income of his most successful year (R. 553, 573-574).

RAISING THE FEDERAL QUESTIONS

Before the Court of first instance, defendant requested as Instruction No. 42: "The Constitution of the United States provides that no law shall be passed abridging the freedom of the press and this is the law of the land and the law of the State of New Hampshire" (Tr. 782); this was given by the Court coupled with instructions that constitutional safeguards do not exempt newspapers from the law of libel, and the imposition of responsibility for libelous publications does not endanger the liberty of the press (Tr. 817). The federal question was again raised before the Court of first instance on defendant's motion to set aside the verdict as against the law, under the caption in its supporting memorandum, "The Verdict Abridges Liberty Of The Press—The Verdict Constitutes An Unlawful And Unreasonable Restraint Upon The Vigorous Exercise Of The Right Of Freedom Of The Press As Guaranteed By The State And Federal Constitutions" (D.Mem. 72-77), but was not discussed by the Superior Court in its ruling on the motion (App. 27a-28a).

Before the Supreme Court of New Hampshire, the federal question was raised on defendant's appeal under the caption in its brief, "The verdict constitutes an unlawful and unreasonable restraint upon the vigorous exercise of the right of freedom of the press as guaranteed by the State and Federal Constitutions" (D.Br., pp. 90-95), and upon defendant's motion for rehearing under the caption in its supporting memorandum, "The decision of the Court, if allowed to stand, would create a harsh, unreasonable, and unconstitutional burden upon the liberty of the press" (D.Mem. 1-11), but was not

discussed by the Court in its opinion (App. 1a-26a) or in its order denying defendant's motion for rehearing (App. 26a).

REASONS FOR ALLOWANCE OF THE WRIT

I. The State Court's Decision "Encroaches on Freedom of Utterance under the Guise of Punishing Libel" by a Constructive Censorship Which Finds Actual Malice from Facts and Circumstances That by Their Very Nature and Character Are Not Evidence of Malice, and Imposes a Punitive and Oppressive Verdict on a Newspaper for Fairly Reporting in Good Faith a Controversy Involving the Expenditure of Public Funds

This Court has not heretofore had occasion to determine whether constructive censorship by State action is as fully interdicted by the First and Fourteenth Amendments to the Constitution of the United States as the censorship prior to publication which was condemned in *Near* v. *Minnesota ex rel. Olson, County Attorney*, 283 U.S. 697 (1931). This Court has, however, foreshadowed this result by making it clear that actions in libel are not removed from the aegis of constitutional protection merely because libelous utterances are not within the area of constitutionally protected speech:

> **"'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled."**

Beauharnais v. *Illinois*, 343 U.S. 250, 263-264 (1952).

This is such a case. Unless this Court invokes its authority, there has been established by the State Court a principle of constructive censorship by State judicial process which "under the guise of punishing libel" strangles the right of a free press to report

fairly upon matters of public concern when they are in controversy; creates an artificial and false malice which it attributes to a publisher who has in fact acted in good faith; and effectively cuts off discussion and criticism by permitting the imposition of penalties upon the press so severe and oppressive that they make unbearable the risks of publishing both sides of a dispute on a public issue.

The newspaper articles in this case involved the performance of a public contract and the expenditure of public moneys—traditional subjects for investigation and report by a free press. The Court below has acknowledged (App. 13a) that the verdict in this case can be sustained only upon a showing of actual malice. To support actual malice, however, the Court below relies upon specifications of alleged actual malice which are completely unreal and illusory and unsupported in the record, and which under no reasonable interpretation can be said to show ill-will, evil motive, an intention to injure, or a wanton disregard of the rights of others and the consequences likely to follow.

This is not a case where the newspaper or any of its employees were seeking to carry on a personal vendetta against the plaintiff, or were even acquainted with plaintiff or aware of his existence before the publication. No one had a personal "axe to grind." The newspaper was not "digging up dirt for dirt's sake." The reporter and his editor believed that they had come upon a story which raised a serious question, in the language of the first article, "of what the city is getting in terms of what it contracted to get for the money agreed upon." There was no reward which could be achieved by the newspaper in publishing the story, except the satisfaction of fulfilling the historic function of a free press.

The Court below nevertheless permitted actual malice to be found upon grounds wholly repugnant to the constitutional protection of a free press. The first alleged instance of actual malice was testimony that the reporter and editor believed the article "could possibly be damaging," or that "it probably would tend in that direction" (App. 14a). It is hornbook law, however, that actual malice may be found only if the article were published solely to harm the reputation of the plaintiff outside of any public interest or concern, and not primarily, chiefly, or to any degree to further the public interest. 3 Restatement of Torts, § 603a; Prosser on Torts, § 95, p. 628 (2d Ed., 1955). If a newspaper is not free to publish information on a public issue because it may incidentally affect the reputation of a person involved, then the Court has imposed an unreasonable and crushing burden upon the right of the press to report and comment upon public affairs.

The second alleged instance of actual malice is the testimony that the reporter and the editor were not experts on the differences between the trees in controversy (App. 14a). It would, however, be an unconscionable imposition on a free press to require that newspaper employees be experts, botanical or otherwise, before they can report upon a highly technical matter in controversy, or else their failure to acquire expertise may be construed as actual malice. In every issue of a metropolitan daily newspaper there is a broad range of complex and difficult subjects reported; the press cannot be free if a story may be reported only by an authority in the field, and if the reporter cannot depend for his information upon expert sources considered reliable in setting forth the respective positions of the disputants.

The third alleged instance of actual malice was the refusal of the reporter to postpone publication at the request of the plaintiff (App. 14a-15a). It is an impossible burden upon a free press, however, to require that a newspaper defer publication for fuller study when it is reasonably satisfied that the pertinent facts have been secured, particularly where it has discussed the contents of the article with the person concerned, he will be correctly quoted and his position correctly stated in the same article, and delay would produce no different result. The business of a newspaper is the publication of "news." "The peculiar value of news is in the spreading of it while it is fresh * * * novelty and freshness form so important an element in the success of the business * * *." *International News Service* v. *The Associated Press*, 248 U.S. 215, 235, 238 (1918). As stated in *Ross* v. *Gore*, Fla., 48 So. 2d 412, 415 (1950): "since the preservation of our American democracy depends upon the public's receiving information speedily—particularly upon getting news of pending matters while there is still time for public opinion to form and be felt—it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer."

The fourth and fifth alleged instances of actual malice, the identification of the plaintiff as the brother of a City official in a different department and the quotation of another nurseryman that the contract could not be performed by plaintiff at the price quoted (App. 15a-16a), are patently unrelated to the issue of malice except as the Court relies upon the testimony of partisan plaintiff witnesses as to the publisher's intent in their interpretation of the articles. However, the use of testimony by readers of their understanding in

order to establish the intent of the publisher has never been authorized by any Court; it was expressly rejected by this State Court in other cases, *Smart* v. *Blanchard*, 42 N.H. 137, 149-150 (1860), *Shaw* v. *Shaw*, 49 N.H. 533, 534, 535 (1870); and it was expressly rejected by this State Court elsewhere in the same opinion (App. 11a), approving "the proper cautionary instruction as to the use of this evidence" given by the Trial Court (R. 816). To permit the meaning and purpose of the publisher to be established by the testimony of selected readers free to place the most extravagant, unwarranted, and extreme interpretation upon his intent and motives, it is submitted, makes a publisher vulnerable for the most innocent publication, and makes of liberty of the press a hollow mockery.

The sixth and final alleged instance of actual malice is merely that one witness denied making certain statements and another that a meeting with plaintiff was "hush-hush" (App. 16a). However, the witness who could not recall having made the statements also testified that as a general comment he would have made substantially the same statements (R. 678); the witness who denied plaintiff was summoned to a "hush-hush" meeting also acknowledged that the article correctly stated that City officials "had gone mum" over the case that plaintiff had been "requested" to appear before the Commission, that members of the press were not invited to be present, and that the meeting was held in the official's insurance office (R. 650-651). Even if the statements were not correct, however, the Courts agree that falsity and actual malice are separate and distinct elements in a libel action.

and both must be proven by the plaintiff to defeat a defense of qualified privilege. *Phoenix Newspapers, Inc.* v. *Choisser*, 82 Ariz. 271, 277 (1957); *Swearingen* v. *Parkersburg Sentinel Company*, 125 W. Va. 731, 745 (1943); *Clancy* v. *Daily News Corporation*, 202 Minn. 1, 10 (1938); *Stevenson v. Wallace*, 144 Kans. 730, 734 (1936); 3 Restatement of Torts, p. 240. The New Hampshire Supreme Court itself has said elsewhere in its opinion (App. 13a) that a publication is protected, even if untrue, if made without actual malice. The effect of the Court's decision would be to destroy the protection to the free press for publications made without malice. Cf. *Snively v. Record Publishing Company*, 185 Cal. 565, 574 (1921); Yankwich, "Private Libel or Public Exhortation," 30 Notre Dame Lawyer 245, 265 (1955).

Individually or collectively, it was thus legally impossible to establish malice in fact by the publisher from alleged instances of this character—that an article may incidentally affect the reputation of a person involved; that the reporter is not an expert on a technical subject; that the newspaper would not hold up publication for further discussions with the plaintiff; that witnesses have testified adversely on their understanding of what the publisher intended the article to mean; or that a third party has denied a statement attributed to him.

What the Supreme Court has here done is to employ as evidence of actual malice facts and circumstances which *by their very nature* can not and do not establish or tend to establish actual malice. Ascribing to evidence a character and meaning incompatible with the intrinsic signification thereof renders the judicial process a mockery and destroys fundamental Constitutional

rights through the guise of formalistic and ostensibly evidentiary proceedings which permit a conclusion wholly unsupported by evidence in fact.

The State decision is of constitutional significance, therefore, because in its broader implications it strikes at the foundations of freedom of the press, and therefore encroaches unreasonably and unconstitutionally on freedom of utterance; it finds malice in the normal and proper operations of a newspaper acting in good faith; and it creates an impossible climate of liability for a newspaper which seeks to publish the circumstances of a dispute regarding a public contract. "Whatever is added to the field of libel is taken from the field of free debate." *Sweeney* v. *Patterson*, 76 U.S. App. D.C. 23, 24, 128 F. 2d 457, 458 (1942), cert. den. 317 U.S. 678 (1942). The freedom of the press to report and comment on matters of community interest, therefore, must necessarily exercise a restraint upon the authority of government, State or Federal, judicial, executive, or legislative, to fashion an unreasonably expansive law of libel. "It is now clear that 'Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.'" *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 570-571 (1942). "Freedoms such as these are protected not only against the heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960).

Liberty of the press within the meaning of the constitutional protection does not relate exclusively to

immunity from previous restraints or censorship. *Near* v. *Minnesota ex rel. Olson, County Attorney*, 283 U.S. 697, 716 (1931). In the history of the struggle for free expression and the free interchange of information and ideas, libel has been the handmaiden of censorship in the restraints of government upon liberty of speech and press; when newspaper censorship as such was abolished, the law of libel became the primary vehicles for restrictions upon free speech and free press, the common law courts succeeding to the jurisdiction of the Court of Star Chamber. See Donnelly, "History of Defamation," 1949 Wisc. Law Rev. 99 (1949); Patterson, Free Speech and a Free Press (1939). From 1695, when the English Parliament permitted an act providing for censorship of the press to expire, "mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press." *Grosjean, Supervisor of Public Accounts of Louisiana* v. *American Press Co.*, 297 U.S. 233, 246 (1936). This Court has said, 297 U.S. at 249-250:

> "Judge Cooley has laid down the test to be applied—'The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's Constitutional Limitations, 8th ed., p. 886."

In *Murdock* v. *Pennsylvania (City of Jeannette)*, 319 U.S. 105, 112 (1943), this Court declared: "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the re-

sources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse." Similarly, an unduly restrictive application of the law of libel can so effectively and severely constrict publication by a newspaper of matters of public concern that a *constructive censorship* has been effectively imposed upon the publisher. As stated in Wiggins, Freedom or Secrecy, p. 144 (1956): "The people will not obtain information if those to whom they look to supply it live under the threat of reprisal for innocent publication, or if the penalties for wrongful publication are such as to make the risks of publishing unbearable". See also Hall, "Preserving Liberty of the Press by the Defense of Privilege in Libel Actions," 26 Cal. Law Rev. 226, 227 (1938).

The mortality among newspapers across the nation because of the high cost of publication is a growing concern to those who regard a free press as a traditional bastion of our liberties. The high cost of an oppressive law of libel must similarly serve as a harsh restraint upon a free press, and upon the time-honored journalistic tradition of undertaking independent inquiry into matters of public concern and reporting controversial public issues. The First Amendment, however, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). "A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions

of a free society." *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 602-603 (1953). "The vitality of civil and political institutions in our society depends on free discussion." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

This case presents an appropriate occasion for this Court to strike down constructive censorship by judicial process, to exercise its "authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." *Beauharnais* v. *Illinois*, 343 U.S. 250, 263-264 (1952). Public controversy is the business of a newspaper because it is the business of the public. The opposing contentions in this controversy were set forth as straight reporting, without heat or rancor, in the best traditions of journalism. If a newspaper may report a dispute of this nature, and in this manner, only at the very real peril that a hostile jury will be permitted to manufacture evidence of alleged actual malice under the guidelines laid down by the State Court, and assess crushing penalties on the publisher, then glory is indeed departed from the liberty of the press, and a constructive censorship has been thrust upon a free press in violation of constitutional guarantees as surely as any of the prior restraints which this Court has heretofore struck down as encroachments upon free speech and a free press.

II. This Court Should Strike Down as Unconstitutional Under the Due Process Clause of the Fourteenth Amendment a Civil Judgment in a State Proceeding Totally Devoid of Probative Evidentiary Support

It is now well established that a criminal conviction in a State tribunal can be so totally devoid of evidentiary support as to be rendered unconstitutional under the Due Process Clause of the Fourteenth Amendment.

Garner v. *Louisiana*, 368 U.S. 157 (1961); *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960). This case presents the issue whether a civil judgment in a State Court involving basic Constitutional rights can similarly violate due process, where it relies for evidentiary support upon the testimony of witnesses completely without probative value on an essential issue of the proceeding.

In his declaration plaintiff sought to ascribe (by innuendo in parenthesis) a defamatory meaning to the language used, (R. 2-4), e.g.:

> "* * * that on July 4, 1954, the Sunday News, on page one, did state in part as follows: 'Says Trees At New Lot Below Par, by James Stack' (meaning that James Stack, reporter for the Sunday News, and agent of the defendant, claimed that trees and shrubs furnished to the City as aforesaid were 'of an inferior species'), 'The Chagnon Garden Center is owned and operated by Roger H. Chagnon, brother of Romeo Chagnon, a Manchester Highway Commissioner', (meaning that the plaintiff procured said contract through the use of unlawful influence by his brother); * * * that on July 17, 1954, the Leader on page 1 printed: 'More on parking lot tree planter' and on July 18, 1954, the Sunday News on pages one and six printed in part as follows: 'Tree Job Leads to Many Claims, by James Stack. Presumably the Finance Commission will use the Pearson report to weigh the question of honoring the Chagnon bill when it is presented for payment' (meaning that the trees and shrubs furnished by the plaintiff to the City of Manchester, as aforesaid, were of inferior material and that the plaintiff had knowingly and unscrupulously furnished inferior stock;) * * *."

At the trial, the Court over defendant's objections permitted a series of witnesses for the plaintiff, none

of whom had any knowledge of circumstances which might give the words a special meaning or effect, to testify what they understood from the articles; what others had said of them; and what their understanding was after they heard others discussing them. The testimony of these witnesses was relied upon by the State Supreme Court to establish the meaning of the articles; *the intent and purpose of the defendant in publishing them;* the extent to which they were read in the community; the effect they produced; and the extent of damages.

Illustratively, one page of the article identified plaintiff as the brother of a prominent Highway Commissioner, a completely unrelated office, and on a different page and five columns away quoted the city employee in charge of planting as having stated that "he didn't know but that there may have been a deal cooking" (R. 82, 402); the State Court seeks to establish a wholly unwarranted charge of malice from these circumstances by relying upon "testimony by a reader of the articles that he understood therefrom 'that Roger Chagnon had taken advantage of his brother's position on the Highway Department and attempted to pass trees that might not have met specifications'" (App. 15a). Because the article reported the opinion of a nurseryman that it would have been impossible to perform the contract at the contract price, the State Court without justification seeks to find *malice in the* publisher from these circumstances because "There was testimony that the article was understood by a reader to mean that Chagnon 'tried to cheat the City; tried to put something over'" (App. 16a).

It is difficult to conceive of a case where there has been a more complete regression to the archaic Twelfth Century procedures of "trial by witness," where "the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on the judge's mind," and to proof by compurgation, 1 Holdsworth, A History of English Law, pp. 302-305 (7th Ed., 1956), Cooley's Blackstone, Commentaries on the Law of England, Book III, p. 342 (4th Ed., 1899).

The essence of the right to a fair trial is destroyed if a party is free to ascribe by innuendo any meaning he chooses to the words of an allegedly libelous publication, and then to establish that meaning by presenting as witnesses those who by friendship, interest, or temperament are most likely to find lurking horrendous, unnatural, and extravagant implications in the meaning of common words plainly used. No individual is free to speak or write if partisan witnesses are to be permitted to testify from the words used the intent and purpose of the writer, and declare as if it were fact that words, however innocent, were uttered with malice. Unless this Court acts, the State Court has established the principle that a witness is free, without regard to any test of competence or personal knowledge and based solely upon his reading of a newspaper article, to testify as to the *intent* of the publisher, and without more to provide the support for an adverse verdict. If plaintiff is thus permitted to pull himself up by his own bootstraps to charge malice in his complaint, and thereupon to offer witnesses to testify as to their understanding of the meaning and purport of newspaper articles, with this subjective understanding

being utilized by the Court as evidence of the intent and motivation of the publisher, then the very essence of due process of law has been violated and profaned.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Hillsborough, No. 4932.

ROGER H. CHAGNON

v.

UNION LEADER CORPORATION.

Argued June 20, 1961.
Decided October 27, 1961.

Action to recover damages for libel of the plaintiff, Roger H. Chagnon, doing business as Chagnon's Garden Center, by the defendant, Union Leader Corporation, doing business under the names of Manchester Union Leader and New Hampshire Sunday News.

The alleged libel resulted from articles written by James Stack, one of the defendant's employees, and published in the New Hampshire Sunday News by the defendant, as well as from certain promotional advertising concerning these articles published in the Manchester Union Leader. They related to the landscaping of a new parking area being constructed in 1954 by the city of Manchester on Merrimack Common.

On May 6, 1954, the city sent out specifications to invite public bidding for this work and among the shrubs, trees and other plants enumerated therein was the one item with which this action is mainly concerned, viz: "410 Arborvitae Columnaris, Size 6'." The request for bids stated that "all materials must meet the standards set up by the American Nurserymen's Association."

Chagnon was awarded the contract to supply the specified nursery stock. He then secured samples of the arborvitae which he intended to provide. He submitted these for inspection by McIntyre, superintendent of Parks and Play-

grounds, the city department in charge of the project, and by Sterling, the city employee who was to select and plant the stock. On or about June 17, 1954 Chagnon bought from a supplier in Connecticut 400 trees which he personally measured before they were dug out of the ground to be delivered to his place of business in Manchester. Sterling and a city crew selected trees from this stock and 310 of them were planted on the common between June 17 and July 3, 1954. Plaintiff purchased 100 trees more to allow selection of the balance needed under his contract.

On July 1, 1954, Stack, a Sunday News reporter, received a telephone call from Eugene Healy, an unsuccessful bidder for the same job who asked to remain anonymous, to the effect that Chagnon "had actually substituted another species of trees" for those required by the specifications. Healy told Stack that one Pearson, a landscape contractor, would confirm the truth of his statement. Stack talked with McIntyre, Sterling and Pearson and on Saturday July 3, informed Chagnon by telephone that he had been told that he was not meeting his specifications and that the newspaper was prepared to print these accusations. Chagnon denied the charges and asked Stack to hold up the story until they could have a personal interview because it was false and publication of it would harm his reputation.

The first article pertaining to this matter was published the next day, July 4, 1954, in the Sunday News. Other articles were published in the same paper on July 11, 18, 25 and on August 1. Promotional advertising relating to these articles was published in the Union Leader on July 3, 10, 17 and 24.

Trial by jury resulted in a verdict for plaintiff in the sum of $99,000.

Prior to trial defendant moved to strike portions of the special declaration and excepted to the denial of its motion by *Sullivan*, J.

During the course of the trial defendant excepted to the admission and exclusion of certain evidence, to portions of the Court's charge and to the denial of its motions for mistrial, nonsuit and directed verdict.

Defendant also excepted to the denial of its motion to set aside the verdict as being against the law, the evidence, based on passion, prejudice and mistake and as being excessive. Also, because the Court erred in denying its previous motion for a mistrial.

These exceptions were reserved and transferred by *Grimes, J.*

Craig & Craig and *McLane, Carleton, Graf, Greene & Brown* (*Mr. Brown* orally), for the plaintiff.

Fuller, Flynn & Riordan and *Welch, Mott & Morgan* and *Herbert E. Forrest* (of Washington, D. C.) (*Messrs. Flynn* and *Morgan* orally), for the defendant.

LAMPRON, J. Defendant maintains that 1) plaintiff failed to establish or sustain his case; 2) it established a complete defense to the action; 3) the Trial Court admitted certain incompetent evidence; 4) a mistrial should have been ordered because the foreman of the jury was not indifferent; 5) the Trial Court erred in its instructions to the jury relative to cheating and malice; 6) the verdict was against the law and the evidence and was grossly excessive.

The first promotional advance notice of an article concerning the plaintiff appeared in the Union Leader on July 3, 1954. The article published the next day in the Sunday News was under the following headline: "Says Trees At New Lot Below Par." It read in part as follows: "Shrub trees of an 'inferior species' failing to meet specifications under a contract given by the city to Chagnon Garden Center of Manchester, are being planted at the new Merrimack Common parking lot, it was charged last night by leading New Hampshire nurserymen.

"The Chagnon Garden Center is owned and operated by Roger H. Chagnon, brother of Romeo Chagnon, a Manchester Highway commissioner.

"The . . . contract . . . calls for the planting of 410 'columnaris arbor vitae trees, six feet tall' . . .

"Leon Pearson, prominent locally in nurserymen's circles, told the Sunday news last night that, in his opinion, the trees being planted 'are not columnaris arbor vitae, but run of the-mill nigra shrubs.'

"Other nurserymen . . . concurred with Mr. Pearson, who examined the trees personally.

" 'Nigra shrubs' it was explained by Mr. Pearson 'are much more plentiful than columnaris and can be obtained much more easily and much more reasonably. The difference in cost would be substantial.'

"Mr. Chagnon . . . denied stoutly that he had substituted 'an inferior species' . . . or that any of the trees planted do not meet size specifications and all other standards.

"On the other hand, Winthrop Sterling, official Manchester Water Works gardener, in charge of passing on the tree standards, refused to give a 'yes' or 'no' answer to the question of whether the shrubs being planted by Mr. Chagnon's firm are columnaris, as specified.

"Mr. Sterling, who said he rejected 'more than 100' trees delivered by . . . Chagnon . . . because they did not in in his judgment meet standards, admitted that 'many of the trees planted are five footers' and do not come close to meeting the six-foot height specification.

" 'But that isn't my fault . . . I'm just a city employee taking orders, and found myself right in the middle. I didn't know but what there may have been a deal cooking' he said.

". . . Joseph Mezitt, proprietor of Weston Nurseries . . . low bidder on the job, had plenty of figures ready.

"'I offered to furnish everything needed—with the exception of a few plants—for $4660 substituting nigra for columnaris.' '[Chagnon's bid was $5970 according to this article of which $3,587.50 was for 410 trees, viz: $8.75 per tree]

"Weston Nurseries underbid Chagnon Garden Center by $1,130. . . .

"[A local nurseryman said] 'Anyone can underbid if they want to supply run-of-the-mill stock. I defy anyone to produce 410 columnaris trees, six feet tall, full throughout for anything like $8.75 each. It can't be done.'"

A second promotional notice appeared in the Union-Leader July 10 reading "Those sub-par shrub trees in Merrimack Common." The following day a second article was published in the Sunday News under the following headline "Supplying Firm Says Trees 'Nigra' Species". In addition to repeating some of the statements previously printed it read in part as follows: "The Cromwell Conn. nursery that furnished shrubs to . . . Chagnon . . . for sale to the city . . . confirmed last night that the trees are of the 'occidentalis nigra' species.

"Roger H. Chagnon . . . denied last week that the species of the shrubs being planted was nigra, or that they did not meet size specifications which called for trees 'six feet high.'

"In the same statement identifying the shrubs as nigra—in spite of Mr. Chagnon's assertion they were not—the Cromwell nursery superintendent [Mr. Webster] revealed to the Sunday News that invoices in his office showed the Manchester landscaper ordered the nigra shrubs 'five to six feet high'.

"Mr. Webster explained that in order for Mr. Chagnon to have insured getting 400 trees 'six feet high' it would have been necessary for him to order shrubs with a specified

size of 'six to seven feet'. The per tree difference in cost would have been substantial, he said.

"[Chagnon's bill] will not be paid according to Manchester Finance Committee Chairman Percy Bennett until landscaper Chagnon secures a statement from the Pierson Nursery that the shrubs are not of the nigra species, but straight columnaris arbor vitae, as called for by specifications.

"Chairman Bennett told a reporter that Mr. Chagnon had 'refused to reveal the source of his supply' to T. Edward McIntyre, superintendent of Parks and Playgrounds, or to show him the invoices for the trees'.

" 'I can understand his possible unwillingness to show the invoices' Bennett said. 'But I can't see why Mr. McIntyre should not be allowed to learn from Mr. Chagnon the source of his supply. We're watching this case.' "

The article reiterated that Weston Nurseries which offered the city nigra shrubs was the low bidder for the work.

A third article appeared in the Sunday News on July 18 entitled "Tree Job Leads to Many Claims". It read in part as follows: "There were new developments on all fronts this week in the case involving the Chagnon Garden Center, the local firm supplying allegedly sub-par shrub trees being planted at the new Merrimack Common parking lot.

"Developments were: (1) The revelation that Mayor Josaphat T. Benoit and City Clerk Michael Quinn had been served with trustee writs resulting from action brought by individuals seeking to collect a total of $14,324.31 from Roger H. Chagnon. . . .

"In addition to trustee writs served on the mayor and city clerk against Chagnon to attach the $5,790 check due him from the city, provided the bill is not held up, City

Treasurer James F. Bourne was notified that the Amoskeag bank had received an assignment of $5,790 from Mr. Chagnon.

"Treasurer Bourne, who acknowledged notification of the assignment by signing it, keeping a carbon copy, said it was, in effect, another writ.

"Brother Not Involved.

"Meanwhile Manchester Highway Commissioner Romeo Chagnon in a statement to the Sunday News disclaimed 'any part in the award of the tree job to my brother. I did not bring any influence whatever to bear on anybody.'"

The promotional notice published in the Union-Leader of July 24 read "more on Parking Lot Tree Mess". The article which appeared in the Sunday News the next day was entitled "Refuse to Release Report on Trees in Parking Lot" and read in part as follows: "Percy H. Bennett, Chairman of the Manchester Finance Commission, refused last night to release a report filed by Leon Pearson leading local nurseryman in connection with shrub trees furnished to the city by the Chagnon Garden Center for planting at Merrimack Common parking lot.

"However, City Hall sources . . . told the Sunday News that, according to the Pearson report, not one of the nearly 300 shrub trees planted thus far meets specifications. The specifications call for columnaris arbor vitae trees with a minimum height of six feet.

"The Pearson report claimed also, it was reported, that a large number of miscellaneous plants furnished by Chagnon under a $5,790 city contract also fails to meet specifications as to size and quality."

On August 1, the Sunday News carried its fifth front page story in this matter. It read in part as follows: "Municipal officials had gone mum over the case through the week, but George Langlois Chairman of the Parks and

Playgrounds Commission admitted yesterday that Roger H. Chagnon had been summoned to a hush-hush meeting.

"Chagnon is owner of Chagnon Garden Center, Manchester, and furnished the city hundreds of trees and miscellaneous other plants, which according to experts, do not meet specifications under a $5,790 contract."

By a letter dated August 23, 1954 Chagnon was advised "that the Parks and Playground Commission elects to rescind the sale as to the trees referred to above: [410 Arborvitae Columnaris, size 6']" He brought suit against the city for breach of contract and obtained a verdict.

"Any written words which directly or indirectly charge a person with a crime, or which tend to injure his reputation in any other way, or to expose him to public hatred, contempt or ridicule are defamatory. Such words, if published without lawful excuse or justification constitute a libel and the person in respect to whom they are written may maintain an action for them without either alleging or proving special damages." *Richardson* v. *Thorpe*, 73 N.H. 532, 534; Restatement, Torts, *ss.* 559, 569.

A publication may be defamatory on its face or it may carry a defamatory meaning only by reason of extrinsic circumstances. In the latter case "the plaintiff has the burden of pleading and proving such facts by way of what is called 'inducement'. Likewise, he must establish the defamatory sense of the publication with reference to such facts, or the 'innuendo.'" Prosser, Torts (2d *ed*) *s.* 92, *p.* 582.

"The function of the innuendo is merely to explain the words in the light of the facts. No mere claim of the plaintiff can add a defamatory meaning where none is apparent from the publication itself in the light of the inducement; and it remains a question for the court whether the meaning claimed might reasonably be conveyed and for the jury whether it was so understood." *Id.*, *Richardson*

v. *Thorpe, supra; Blanchard* v. *Claremont Eagle, Inc.*, 95 N.H. 375, 378; Restatement, Torts, s. 563, *comment* f.

In considering whether plaintiff's declaration stated a cause of action for defamation the words used in the articles are to be considered together with their context and must be taken in the sense in which they are reasonably understood under the circumstances by persons familiar with the language used. *Robinson* v. *Keyser*, 22 N.H. 323, 324; Restatement, Torts, s. 563, *comment* c.

Defendant takes the position that "Under no reasonable construction . . . could the words in the articles complained of be capable of the meaning which plaintiff sought to ascribe to them by the innuendoes in the declaration, so that, there was no question for the jury to determine. Accordingly, the declaration failed to state a cause of action upon which relief could properly be granted; the motion of defendant to strike the allegations and other matters set forth in plaintiff's declaration as innuendoes should have been granted; and the case should have been dismissed."

The plaintiff set out in his declaration the following words used by the defendant in its articles or promotional advertisements as being defamatory. "Parking Lot Landscape Job in Hot Water"; "Says Trees At New Lot Below Par, by James Stack"; "The Chagnon Garden Center is owned and operated by Roger H. Chagnon, brother of Romeo Chagnon, a Manchester Highway Commissioner"; "Those sub-par trees in Merrimack Common"; "Parking Lot Dispute, Supplying Firm Says Trees Nigra Species, by James Stack"; "Weston Nurseries, Weston, Mass. offered the City Nigra shrubs in a sealed proposal of $4,660. . . . $1,130. less than the Chagnon bid of $5,790., Weston was low bidder"; "More on parking lot tree planter"; "Tree Job Leads to Many Claims, by James Stack; Presumably the Finance Commission will use the Pearson report to weigh the question of honoring the

Chagnon bill when it is presented for payment"; "More on Parking Lot Tree Mess;" "Refuse to Release Report on Trees on Parking Lot. The Pearson report claimed also, it was reported, that a large number of miscellaneous plants furnished by Chagnon under a $5,790., City contract also fail to meet specifications as to size and quality"; "Parking Lot Tree Case Unsettled."

The plaintiff by innuendoes in his declaration attributed the following defamatory meaning to these words. The trees being furnished by the plaintiff under his contract were of a species inferior to that called for in his contract and were improper. Weston Nurseries being the low bidder, plaintiff wrongfully and fraudulently obtained the contract with the city of Manchester probably through the use of unlawful influence by his brother. The trees and shrubs which plaintiff supplied were of an inferior grade and he knowingly and unscrupulously furnished inferior stock and that is the reason why the city has refused to pay him therefor.

Taking in consideration all the circumstances under which these words were written, their context, the meaning which could reasonably be given to them by the readers, we are of the opinion that it could be found that the words in defendant's articles complained of were understood in the sense stated in the innuendo. Defendant's motion to strike out certain parts of plaintiff's declaration and to dismiss the case before trial was properly denied. *Gendron* v. *St. Pierre*, 73 N.H. 419; *Catalfo* v. *Shenton*, 102 N.H. 47.

Defendant maintains further that the Trial Court erred in permitting divers witnesses to testify as to how they understood the articles, as to their understanding after they spoke to other persons and in instructing the jury that their testimony could be considered in determining whether the articles were defamatory. Defendant claims that all of the words of the articles, whether read singly or considered as a whole, are reasonably plain, clear and unam-

biguous, with commonly accepted and understood meanings and connotations, and that there were no extrinsic facts or circumstances justifying the admission of the testimony of these witnesses.

Plaintiff had the burden of proving that the statements which the defendant published about him reasonably understood by the readers were defamatory of him and also the extent of the damage which they caused. *Smart* v. *Blanchard*, 42 N.H. 137, 147; *Richardson* v. *Thorpe*, 73 N.H. 532, 534; *Blanchard* v. *Claremont Eagle, Inc.*, 95 N.H. 375, 378. To that end plaintiff set out in his declaration by way of inducement certain prefatory matters, particularly the existence of the contract with the city, and by innuendo an explanation of the words used by the defendant which could give them a defamatory meaning.

Defendant has argued that the words used in the articles were capable of a nondefamatory interpretation. Plaintiff contends and we have already stated that we are also of the opinion that these same words could be found to have a defamatory meaning. It has been the rule in New Hampshire for a century that where words are ambiguous the testimony of hearers or readers thereof as to how they understood them can be received. *Smart* v. *Blanchard*, 42 N.H. 137, 146-150; *Moore* v. *Butler*, 48 N.H. 161, 167; *Shaw* v. *Shaw*, 49 N.H. 533. The witnesses were persons to whom the alleged libel was published and they were testifying to their understanding of the words in the articles. This was material evidence on the issue of whether the words used were reasonably understood by the readers to be defamatory of the plaintiff and the Court gave proper cautionary instruction as to the use of this evidence. *Shaw* v. *Shaw*, *supra*, 534.

The Trial Court also allowed witnesses to testify that other people were making statements as to their understanding of the publications and whether these statements caused any change in the witnesses' own understanding

of what the articles purported to say. We are of the opinion that this evidence was admissible to establish the extent to which these articles were read in the community and the effect which they produced. *American Employers Ins. Co.* v. *Wentworth*, 90 N.H. 112, 116, 117; *Emery* v. *Woodward*, 96 N.H. 61, 62; *Maltex* v. *News Syndicate Co.*, 176 F. 2d 897 (2d Cir. 1949) cert. denied 338 U.S. 858 (1949). This evidence also tended to show that the witnesses' interpretation of the words used was not bizarre or strained.

In defense defendant relied on justification, conditional privilege and privileged criticism.

Justification is established if the facts alleged were true and were published with a justifiable motive. *Palmer* v. *Concord*, 48 N.H. 211, 217; *Hutchins* v. *Page*, 75 N.H. 215. It would serve no useful purpose to attempt to review the voluminous record of this case in this opinion. A reading thereof however leads to the conclusion that the jury could find on the evidence that the publications made by the defendant were reasonably understood by readers thereof to state that Chagnon did in fact supply to the city a cheaper and inferior species of trees than those called for by his contract and that he did this knowingly and for the purpose of cheating the city.

The specifications called for "410 Arborvitae Columnaris, Size 6'". The jury could find on the evidence that the trees supplied by Chagnon were "Thuja Occidentalis Fastigiata." Also that "Arborvitae" is the common word used to include all species and varieties of the genus "Thuja" including the species "Thuja Occidentalis" of which "Fastigiata" is a variety. The jury could also find that "Fastigiata" denotes a columnar tree which is the variety of "Arborvitae" or "Thuja Occidentalis" the city was seeking by the word "Columnaris" in the specifications. There was also evidence which would warrant a finding that a tree of the five to six foot size under the

standards of the American Nursery Association would be the proper size to produce a screening hedge six foot in height as shown on the drawings furnished to the city by the consultant who drew the specifications for this project. The jury could also find that trees of the variety "Nigra" are not of an inferior variety to those of the "Columnaris" variety.

Although it is not necessary for the defendant to prove the literal truth of a defamatory statement in every detail but only that it is substantially true we cannot say as a matter of law that the defendant met that burden in this case. The jury could find on the evidence that the defamatory statements published by the defendant were untrue. *State* v. *Burnham*, 9 N.H. 34, 42; *Emde* v. *San Joaquin County Central Labor Council*, 23 Cal. 2d 146; Restatement, Torts, s. 582, *comment* e; Prosser, Torts (2d *ed.*) s. 96, *p.* 632.

Even though a defendant cannot justify the publication because it can be found to be untrue he may excuse it by showing it was privileged. A conditional privilege, which is what is claimed here, is established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds of its truth. *Carpenter* v. *Bailey*, 53 N.H. 590, 595; *Lafferty* v. *Houlihan*, 81 N.H. 67. However if a defamatory statement is made with actual malice it cannot be excused as privileged. *State* v. *Burnham*, *supra*; *Hutchins* v. *Page*, 75 N.H. 215, 216.

The Trial Court charged the jury as to what constitutes malice in the following words: "by malice I mean not only ill-will, evil motive or intention to injure but also a wanton disregard of the rights of others and the consequences likely to follow." We are of the opinion that this was a proper statement of the applicable law. *Hoeppner* v. *Dunkirk Printing Co.*, 254 N. Y. 95; *Petition of Retailers Commercial Agency, Inc.*, 174 N.E. 2d 376, 380 (Mass.

1961); *Dun & Bradstreet, Inc.* v. *Robinson*, 345 S. W. 2d 34 (Ark. 1960); *Shapiro* v. *Health Insurance Plan of Greater N.Y.*, 7 N.Y. 2d 56.

The record contains the following evidence on the issue of malice. Stack, the Sunday News reporter who wrote the articles, testified as follows: "Q. Did you recognize at that time that those stories, if published would have the probable effect of damaging the business reputation of Mr. Chagnon, the man concerning whom you were making the charges? A. Yes, I think it is fair to assume that if you are going to publish a story about a man's business, if that story is going to question . . . his business integrity or his good faith; I think on the face of it, any honest person would recognize that such a story could possibly be damaging." McQuade, the editor of the Sunday News with whom Stack discussed the articles before they were published, testified: "Q. . . . Would you be willing to admit, Mr. McQuade, that that type of publicity would probably harm the business reputation of the landscaper being talked about? A. Yes, I think it probably would tend in that direction."

There was testimony by McQuade that he claimed no competency to determine whether a particular type of Arborvitae is or is not designated in a particular contract. Stack testified that he was not familiar with different species of shrubs and did not consult any reference book on the subject.

Stack testified that when he talked on the telephone with Chagnon on July 3, "Mr. Chagnon denied right at the outset that the trees involved did not meet specifications . . . Mr. Chagnon asked me to hold up on the story until a personal interview could be set up, at which time he could go over the whole thing." Chagnon testified that he "begged" Stack to give him a chance to prove personally that the accusations were false and that Stack told him "he was not interested to find anything on my part."

Chagnon also testified that he told Stack "I want to see you personally . . . you are going to damage my business and throw me on the rocks." and that Stack "hung up the line on me."

There was also testimony by Stack as follows: "Q. Let me ask you . . . so far as the protection of the public is concerned, was there any reason why that story could not have been held over for the next week? A. No reason other than that my editor, on the basis of what I gave him, decided it was warranted to print it that week . . . Q. No reason why the story couldn't have been held up long enough so that you could have sat down with Mr. Chagnon. Right? A. There is no reason . . . why that or any other story that appears in a newspaper cannot be held up . . ."

When asked the reason for, and the effect of, the mention of the name of Romeo Chagnon, as a Manchester Highway Commissioner and brother of the plaintiff, in his article together with a statement by Sterling that he "didn't know but that there may have been a deal cooking" Stack testified as follows "Q. The tie-in of a city official, suggesting a deal is on that is going to cost the city money, makes the story more interesting in fact, doesn't it? A. I cannot speak for all the readers of a newspaper but to me it does." There was testimony by a reader of the articles that he understood therefrom "that Roger Chagnon had taken advantage of his brother's position on the Highway Department and attempted to pass trees that might have not met specifications."

When asked about the statement in the first article that Mr. Mezitt of Weston Nurseries was low bidder on the job Stack testified as follows "Q. Isn't it a fact that as you put this story together you intended to and did indicate that the price Chagnon bid indicated he could not have supplied the proper trees? . . . A. I can't swear that I intended it that way but if I were to read Mr. Mezitt's quote as a reader of the newspaper I would assume, yes, that

that inference was there." Mr. Mezitt was quoted in that article as follows: "I offered to furnish everything needed—with the exception of a few plants—for $4,660, substituting nigra for columnaris." The article also read "Mr. Mezitt explained that the relative scarcity of columnaris of the size and standard specified, would have made the job, 'pretty near $7,000. It would have been impossible to make it less.'" The article stated that the Chagnon bid was $5,790. There was testimony that the article was understood by a reader to mean that Chagnon "tried to cheat the City; tried to put something over."

Some articles contained alleged statements made by Percy Bennett, Chairman of the Manchester Finance Committee which he denied making. The Chairman of the Parks and Playgrounds Commission denied that Chagnon was summoned to a "hush-hush" meeting as stated in the last article.

We are of the opinion that the jury considering the articles, their language, the manner and circumstances under which they were published could find that they were published with actual malice as defined in the Trial Court's charge which we have hereinbefore approved as stating the applicable law. *Smart v. Blanchard*, 42 N. H. 137, 151; *Lafferty v. Houlihan*, 81 N.H. 67; *Petition of Retailers Commercial Agency, Inc., supra.* Such a finding negatives a defense of privileged communication or criticism. Thayer, Legal Control of the Press (3d *ed.*) p. 399.

We are also of the opinion that the foregoing evidence warranted the Court's charge that "a publication which imputes to another a criminal offense constituting a felony is defamatory. Cheating or attempting to cheat or defraud by any false means or false pretense is a felony in this state." See RSA 580:1.

We consider next defendant's exceptions to the denial of its motion for a mistrial made during the trial and to the denial of its motion to set aside the verdict on that

ground among others. The situation is set out in its brief to be the following: "The Court was advised during the impanelling of the jury, by the juror who was later to become foreman, that the foreman's son, who was of age and employed [the son was 40 or 45 and a school teacher] had engaged one of plaintiff's attorneys to represent him in a 'driving under the influence' case then pending in Municipal Court, but stated that this would make no difference in his consideration or decision of the case. All counsel expressed satisfaction with the juror, and later interposed no objection to his designation as foreman. The record also reflects, however, that counsel for defendant, did not realize that the son was an unmarried member of the foreman's family who lived at home, and that both counsel for plaintiff and for defendant thought that the trial of this libel action would be completed before the son was tried in Municipal Court. Instead the trial of the case against the son . . . proceeded during the Christmas recess of the trial of this action, while the foreman of the jury was present as a spectator although speaking with counsel only in connection with bail." The son was found guilty and appealed.

The information conveyed to the Court by the juror when the jury was being impanelled and relayed by it to counsel for the parties was accurate. The juror was not disqualified as a matter of law for interest. *Adams* v. *Severance*, 93 N.H. 289, 293; *McLaughlin* v. *Union Leader*, 99 N.H. 492, 499. The jury was properly constituted. See *Shalinsky* v. *Railroad*, 83 N.H. 86, 88-89.

We next consider whether the trial was rendered unfair by what transpired in the trial of the son's case during the suspension of the trial of this case. Obviously it would have been preferable if the case had not been tried by counsel engaged in this case and if the foreman of this jury had not been present. *Cloutier* v. *Charland*, 100 N.H. 63, 64. However the Trial Court's denial of defendant's

motion for a mistrial on that account and the Court's refusal to set aside the verdict on that ground were equivalent to a finding that the defendant had a fair trial and no reason appears why that finding should be disturbed or the action of the Court set aside. *Perry v. Faulkner*, 100 N.H. 125, 127.

We consider defendant's exception to the denial of its motion that the verdict for plaintiff in the amount of $99,000. be set aside because it is against the law and the evidence, the jury were influenced by passion or prejudice or fell into plain mistake, and because the verdict was excessive.

Broadly stated, the plaintiff is entitled to recover such damages as are the natural and direct or proximate result of the publication. 53 C.J.S., Libel and Slander, *s.* 240, *p.* 363. When as in this case, the jury could find that the defamatory publication charged the plaintiff with a crime or with activities which would tend to injure him in his trade or business, commonly called libel *per se*, he can recover as general damages all damages which would normally result from such a defamation, such as harm to his reputation. *Id.*, *s.* 240, *p.* 363. 1 Harper & James, Law of Torts, *s.* 5.30, *p.* 468. He need not prove these damages specifically. Restatement, Torts, *s.* 624, *p.* 314.

In addition to the above he is entitled to recover such special damages as he has proved have resulted and will result in the future as the natural and proximate consequence of defendant's defamatory act. These would include specific harm to his personal reputation in addition to the general harm which would be assumed to result from the libel, harm to his business reputation and credit reputation, loss of business and any other damage which he has proved resulted as the normal and direct consequence of the defamation.

When the element of malice enters into the wrong "the rule of damages is different and more liberal. . . . In such

cases there enter into the question of damages considerations which cannot be made the subject of exact pecuniary compensation,—such as . . . mental distress and vexation, what in common language might be spoken of as offences to the feelings, insult, degradation, offences against honest pride, and all matters which cannot arise except in those wrongs which are attended with malice." *Bixby* v. *Dunlap*, 56 N.H. 456, 462, 463. The jury is to "endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay." *Id.*, 464; *Symonds* v. *Carter*, 32 N.H. 458; *Knight* v. *Foster*, 39 N.H. 576; *Fay* v. *Parker*, 53 N.H. 342; *Adams* v. *Strain*, 80 N.H. 90, 91.

We have already decided that there was sufficient evidence from which the jury could find that the publications by the defendant were made with actual malice. It would prolong this opinion unduly without serving any useful purpose to again review that issue at this point.

Defendant first contends that damages could not be awarded in this case for injury to feelings, for mental anguish, or for personal and public humiliation. The reasons given for its position are that the plaintiff failed to show that probable malice existed; that the "suit was brought not by Roger H. Chagnon in his individual capacity, but solely by Roger H. Chagnon in his capacity as a business entity" and such an entity cannot suffer such damages; that by stipulation at pre-trial plaintiff abandoned any claim to such damages.

Plaintiff's declaration alleges that the libels were "of and concerning the plaintiff, and, of and concerning his business as landscaper and nurseryman"; that they were calculated "to bring the plaintiff into hatred, contempt, ridicule or cause him to be shunned or avoided; to injure him in his business" and that "said plaintiff individually, has been and is greatly injured in his good name, credit and

reputation brought into public scandal and disgrace . . . [that] plaintiff in his capacity as a businessman, has been and is greatly injured in his good name, credit, reputation . . . has been and is injured in his feelings, has been and is caused to suffer great mental anguish, personal and public humiliation, and has been and is otherwise injured."

The plaintiff testified, over objection by defendant but not on the ground now advanced, that after reading the articles published by the defendant "I felt like I was a crook. I didn't have a chance to fight. I didn't have a chance to prove myself. Everybody were looking down at me. I just felt like I was a crook in another word . . . I felt nervous. Just a nervous wreck." We are of the opinion that a reading of plaintiff's declaration as a whole shows that he sued and was seeking damages for injury to himself as an individual and in his capacity as a businessman. There was no evidence that at the time of the publication of the articles in question he was doing business as a partnership or as a corporation which would prevent the recovery of this type of damages. *National Refining Co.* v. *Benzo Gas Motor Fuel Co.*, 20 F. 2d 763, 766; 33 Am. Jur., Libel and Slander, *s.* 205, *p.* 195.

The pre-trial order with respect to plaintiff's claims read as follows: "In this action the plaintiff claims that the defendants in their newspapers published said defamatory statements about the plaintiff which injured him in his business and reputation." Assuming, without deciding, that this order excluded a claim by the plaintiff for injured feelings, mental anguish and personal or public humiliation, the Trial Court had discretionary authority to permit in the interest of justice modification of the order to conform to the evidence in the case. *Lynch* v. *Bissell*, 99 N.H. 473, 478; *Lamarche* v. *Granite State &c. Ins. Co.*, 101 N.H. 210, 213. This element of damages could properly be considered by the jury. Restatement, Torts, *s.* 623.

Defendant argues further that "the evidence as to alleged damages demonstrated no injury to business or repu-

tation, and was so uncertain, speculative, conjectural, and vague as to be incapable of ascertainment or discernment." Plaintiff stated at the trial his position on the issue of damage to him in his capacity as a businessman as alleged in his pleadings to be as follows: "We are not claiming loss of profits as part of the damages here. We propose to show the extent to which gross business was driven away as a result of the damage to the business reputation and the effect of that driving away of our business upon the plaintiff's overall business condition, the amount of money he could or couldn't earn and withdrawn from his business, and we rely upon it as some evidence of the extent to which this man was damaged in his capacity as a businessman." In order to prove "the extent to which our gross business was driven away, the amount of gross business which we lost and the effect upon the operation itself", plaintiff proceeded as follows: he undertook to show "an established business, the amount of sales for a substantial period preceding the publication, the amount of sales subsequent to the publication, facts showing that such loss in sales were the natural and probable result of such publication" *Erick Bowman Remedy Co. v. Jensen Salsberry Laboratories*, 17 F. 2d 255, 261 (8th Cir. 1926).

There was evidence that each edition of the Union Leader in which the promotional notices were published was probably read by between 60,000 to 80,000 persons in the city of Manchester and the area around it. There was further evidence that each edition of the Sunday News in which these articles appeared were read by from 100,000 to 130,000 persons of which 25,000 to 30,000 were in the Manchester area. There was testimony that these articles were discussed "a lot". These discussions took place at the Highway Department, at City Hall, along the street, in a club, in a lot of stores, in the smoking room of a factory, "practically anywhere I went in public or people I bumped into." "In great many circles where Roger was not known personally the reputation of his Garden Center was ques-

tioned after the articles." There was further testimony that since these articles plaintiff's business reputation as a supplier of nursery materials and as a man engaged in the landscape field is "he might be dishonest and it would be better to maybe call someone else." This situation was in existence at the time of the trial.

There was also evidence that after these articles, new customers were not as numerous as they were the previous years. Also that before this difficulty the plaintiff supplied several building contractors with shrubs and trees and that except for two of them none has returned since then. A customer satisified by plaintiff's previous work for her testified that she was dissuaded from doing business with plaintiff by a total stranger clerking in a paint store and by co-employees at the telephone office.

Figures were introduced in evidence showing that plaintiff's gross sales which had risen from $37,338.21 in 1949 to $71,072.26 in 1953 were $42,645.14 in 1954, $34,650.23 in 1955, $46,082.65 in 1956 when plaintiff had to give up the Garden Center and nursery stock business. Plaintiff still has the landscaping service. The sales of the latter service which were $50,985.88 in 1953 dropped to $25,030.05 in 1954, $19,836.04 in 1955, $20,563.82 in 1956 and $14,974.10 in 1957. These gross sales which in 1953 had risen almost $12,000 over the previous year dropped below the figure for 1953 in amounts aggregating $123,000 for the years 1954 to 1957 inclusive.

There was testimony that plaintiff's business does not enjoy the bank credit or the general trade credit it enjoyed previous to these articles. There was evidence that at the beginning of 1954 plaintiff's equity in the business was $6,000 and that at the end of 1957 his equity position was a $10,000 deficit. It was testified that the reduction in gross sales with the resulting loss of equity in the business experienced since 1954 was "due to articles in the Union Leader, bad publicity in regards to the Merrimack Common trees."

The fact that damages for loss of business are difficult of accurate determination does not prevent recovery for them. *Proto v. Bridgeport Herald Corporation*, 136 Conn. 557. Publication of these articles in a newspaper of large circulation in the area was evidence from which the jury could find that the defamatory statements had probably come to the attention of customers of the plaintiff. *Id.* Because the articles by their nature could be found to have a tendency to injure plaintiff's business, and from the testimony that they did, the jury could find that they were the cause of the loss of business incurred by plaintiff after their publication. *Id.*

We consider lastly defendant's argument that the amount of the verdict was excessive and was so exorbitant and grossly excessive as to demonstrate that it was awarded under the influence of passion, prejudice, partiality and mistake.

The law for the guidance of the Trial Judge in this matter has been stated as follows: "To justify the interference of the Court, the damages must be manifestly exorbitant; and so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice or have been misled by some mistaken view of the merits of the case." *Hanlon v. Pomeroy*, 102 N.H. 407, 409. The statements of the Trial Court in denying the defendant's motion to set the verdict aside indicate that he properly applied these principles within the framework of the rules controlling the assessment of damages in the case before him.

The standard for the action of the appellate court in the circumstance has been thus set out: "The consideration of the defendant's motion involved questions of fact for the Judge and his decision should not be set aside unless no reasonable person would make it." *Id.*; *Roy v. Levy*, 97 N.H. 36, 40; *Wisatskie v. Maloney*, 88 N.H. 242, 246. "In most jurisdictions the view is taken that the trial judge,

because of his more favorable position to determine the weight of the evidence and assess all the circumstances involved, may more freely interfere with the verdict than the appellate court and that his decision upon this question will be given great weight in passing upon the question on appeal." Anno. 35 A.L.R. 2d 218, 223.

The amount of the verdict in this case must be assayed in the framework of our rule that "when the element of malice enters into the wrong a more liberal rule of damages prevails, and the jury, taking into consideration all the circumstances of the wrong, ought to give as a compensation what in their judgment it is reasonable that the plaintiff should receive and the defendant pay." *McBride* v. *Huckins*, 76 N.H. 206, 214.

Plaintiff's family "is one of the best . . . and extremely well thought of." "He had a good reputation as a landscape gardener, a fine reputation." After having engaged in landscaping and nursery work since the age of 12 (he was 45 at the time of the trial), he started a business of his own a few years prior to 1950 operating from a greenhouse owned by his father. In September 1949 he bought land on Second Street in Manchester and with the help of a contractor he started to build his Garden Center in December and opened for business about May 10, 1950. Thereafter his sales increased from $37,338.21 in 1949 to $71,072.26 in 1953. In 1949 landscaping accounted for $37,338.21 of those sales and in 1953 the amount was $50,985.88.

On July 4, 1954, the Sunday News published on its front page the first of its articles in which it was charged that trees at Merrimack Common were below par; that trees of an inferior species failing to meet specifications under a contract given by the city to Chagnon Garden Center were being planted there. On the next four Sundays' articles unfavorable to plaintiff appeared on the front page of that paper. Most of those articles were preceded on the previ-

ous Saturday by a promotional advertisement thereof on the front page of the Union Leader.

These articles were understood by some of the potential 25,000 to 30,000 readers of the Sunday News in the Manchester area, the Union Leader has 60,000 to 80,000 such readers, to have the following meanings: Chagnon "tried to cheat the city; tried to put something over." He "had taken advantage of his brother's position on the Highway Department and attempted to pass trees that might not meet specifications." He "was being dishonest." He "was a cheat, he was trying to cheat the city . . . It looked like the city was being taken." These articles were widely read and provoked discussion at City Hall, a club, in stores, on the street.

Plaintiff's gross sales of $71,072.26 in 1953, before these articles were published, dropped to $42,645.14 in 1954, $34,660.23 in 1955 and $46,082.65 in 1956. New customers became less numerous than in previous years after the publication of the articles. All but two of the building contractors to whom plaintiff had been supplying shrubs and trees did not return. Chagnon had to give up the Garden Center and nursery stock business in 1956.

Sales of the landscaping business, which he retained, had been $50,985.88 the year before publication of those articles. In 1954 they dropped to $25,030.05. They were $19,836.04 in 1955, $20,563.82 in 1956 and $14,974.10 in 1957. From a steady increase in the three previous years those sales dropped over $123,000 from 1954 to 1957. His bank and general trade credit was adversely affected.

The jury could find the defendant activated by malice, caused widespread publication over an extended period of time of articles seriously defamatory of plaintiff. They could find further that these libels caused serious injury to plaintiff's business reputation and caused him to suffer a substantial loss of business and credit which would prob-

ably continue in the future. *Dun & Bradstreet Inc.* v. *Robinson*, 345 S.W. 2d 34 (Ark. 1960). They could find that in addition to having sustained financial loss including the outright loss of his newly established retail business, the plaintiff was effectively deprived of an opportunity to improve the circumstances of his entire operation, and that he suffered as well a grave and lasting injury to his personal reputation and credit, with the mental distress which followed unwarranted exposure of himself and his family to the disgrace and obloquy of unjustified charges. In the circumstances we cannot say that the verdict was the result of passion, prejudice, partiality and mistake rather than an award of the compensation which "in their judgment it is reasonable that the plaintiff should receive and the defendant pay." *McBride* v. *Huckins*, *supra*. Nor can we say that the Trial Court acted as no reasonable person would in refusing to set aside the verdict. *Wisutskie* v. *Malouin*, 88 N.H. 242, 246; *Proto* v. *Bridgeport Herald Corporation*, 136 Conn. 557.

Judgment on the verdict.

All concurred.

Order

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the case of No. 4932 Chagnon v. Union Leader Corporation the court upon November 30, 1961, made the following order:

Motion for rehearing denied.

Concord,
November 30, 1961

By order of the Court:

GEORGE O. SHOVAN,
Clerk.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Hillsborough, ss. January Term, 1959

ROGER H. CHAGNON doing business as
CHAGNON'S GARDEN CENTER

vs.

UNION-LEADER CORPORATION doing business under the names of MANCHESTER UNION-LEADER and the NEW HAMPSHIRE SUNDAY NEWS

Ruling on Defendant's Motion to Set Aside the Verdict

The defendant's motion to set aside the verdict is denied. Defendant excepts. Most of the grounds relied upon relate to matters ruled upon during the course of the trial and are a part of the record and require no special comment.

During the impaneling of the jury, the juror who later became foreman informed the Court at the bench that his son was represented by one of the plaintiff's attorneys in a "driving under the influence" case then pending in a Municipal Court. He said that his son was employed, was of age and that he, the juror, had nothing to do with the employment of counsel. He said, on being questioned, that this representation of his son would make no difference in his consideration or decision of the case, but that he desired to make the fact known. All counsel were informed at the bench, without the stenographer, of these facts, to give an opportunity for objection or challenge for cause. Counsel for the defendant expressed satisfaction with the juror. After the preemptory challenges had been exercised and the panel completed, the juror in question was sitting in the foreman's chair and I believe had not previously served as foreman. He would, if qualified, ordinarily be made foreman. Because of the previous discussion concerning him, all counsel were asked at the bench, in the absence of the stenographer, if they had any objection to his being

made foreman. There was no objection. These facts were all given consideration by the Court in the denial of the motion for mistrial and in the denial of this motion. They are stated at this time as I recall them, because they do not fully appear on the record, although some of them are referred to in the hearing on the motion for mistrial.

On the question whether the Court should set aside the verdict on the ground that it is excessive, consideration must be given not only to the limited power of the Court but also to the type of damages allowable under the law of libel if actual malice is found. It is not a question whether the Judge, acting as a juror, would or would not have come to the same conclusion as the jury. The Court must act within the limitations prescribed by law.

It is the opinion of the Court that the "more liberal rule" of damages which applies in libel cases if actual malice is found allows the jury to consider the elements described in Bixby v. Dunlap, 56 NH, 456, 464, 465, and Symonds v. Carter, 32 NH, 458, 467; and this, considering the limitations within which the Court must act, prevents the Court from setting aside the verdict as excessive.

WILLIAM A. GRIMES
Presiding Justice

Dated: July 2, 1959.